STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 266805 Lenawee Circuit Court
JAMES JOSEPH GRABIEC, Defendant-Appellant.	LC No. 05-011519-FC

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree home invasion, four counts of armed robbery, four counts of felonious assault, one count of assaulting or resisting a police officer, one count of larceny in a building, four counts of kidnapping, one count of possessing a dangerous weapon with unlawful intent, and one count of conspiracy to commit armed robbery. His sentences included multiple life sentences. Defendant appeals his convictions and his sentences. We affirm.

This case arose out of a home invasion that took place on the evening of February 6, 2005, when two masked men entered a home armed with guns, ordered the inhabitants into the kitchen, bound them with duct tape, threatened and struck them, and eventually fled with the keys to the victims' vehicle when they observed police outside the house. None of the victims were able to identify the intruders. The police were summoned when a family friend happened to observe the crime in progress and called 911. The police observed two men exit the house and chased them. Although they lost sight of defendant briefly, he was apprehended. Two other individuals, Phillip Pennell and Maricel Silva, were also arrested in a nearby vehicle; in exchange for plea bargains, both testified against defendant at trial. Pennell and Silva identified defendant as having been involved in a plan to rob the house, which Silva's brother had indicated to defendant contained drugs and money. Defendant testified on his own behalf that he had happened to be walking in the area when he was tackled by police. Defendant represented himself at trial.

Defendant first asserts on appeal that the trial court employed an impermissible "start/stop" procedure when it commenced his preliminary examination within 14 days of his arraignment, as required by MCL 766.4, only to halt it almost immediately and, over his objection, adjourn it to a later date. A preliminary examination may be adjourned or delayed beyond 14 days for good cause shown. MCL 766.7; MCR 6.110(B); see also *People v Horne*,

147 Mich App 375, 377-378; 383 NW2d 208 (1985). Moreover, a violation of the 14-day rule would at most entitle defendant to a discharge *without prejudice* to the prosecutor's right to reinstate the actions against him. *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982). The district court apparently began the proceedings shortly before the official time for closing the court, but the transcripts clearly show that the judge fully intended to disregard that as an impediment to continuing. However, the judge had another commitment in two and a half hours, the attorneys conceded that the examination would likely take much longer than that, and it was discovered that Pennell's attorney[1] was representing one of the victims in another matter, necessitating a new attorney. The district court had good cause for the adjournment. Defendant alleges he was prejudiced by the victims' memories being corrupted, inducing them to identify him. However, the victims all explained that they could not identify the perpetrators, and in fact they believed the perpetrators were black, when in fact defendant is white.

Defendant next asserts that the trial court erred in permitting him to represent himself. We disagree.

When reviewing a criminal defendant's waiver of the right to counsel, the trial court's factual findings are reviewed for clear error, and the interpretation or application of any legal or constitutional issues are reviewed de novo. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), cert den 543 US 1095; 125 S Ct 965; 160 L Ed 2d 910 (2005). Before a defendant may proceed as his own counsel, the trial court must determine that the waiver is unequivocal, knowing, voluntary, intelligent, and with full awareness of the risks involved; also, the self-representation must not disrupt trial proceedings. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004). In addition, the trial court is required to comply with the requirements of MCR 6.005. *Id.* However, the court rule requires *substantial* compliance rather than a formalistic "litany approach;" the trial court must be certain that the requirements for a proper waiver are met, but minor or superficial irregularities will not give rise to an "appellate parachute." *Russell*, *supra* at 191-192. Nevertheless, all courts "*must* indulge every reasonable presumption against the waiver of the right to counsel." *Id*., 193 (emphasis in original).

Defendant first asserted his right to self-representation by writing a letter to the trial court, and that letter shows no equivocation whatsoever. Defendant argues that he merely displayed a veneer of false self-confidence, but a defendant's subjective mental state "can only be gleaned by reference to what he said on the record." *Williams*, *supra* at 643-644. Over the course of several more hearings, defendant and the trial court repeatedly engaged in discussions about his self-representation, including the role his assigned standby counsel should play. It is clear that defendant wished to "have it both ways": he desired to manage the details of his defense but at the same time direct his standby attorney to perform legal tasks, and he argued that he had a right to do so. In fact, it appears that defendant sought to assert a right to proceed with exactly the kind of "hybrid defense" that this Court has explicitly rejected. *People v Kevorkian*, 248 Mich App 373, 419-422; 639 NW2d 291 (2001), cert den 537 US 881; 123 S Ct 90; 154 L Ed 2d 137 (2002). A criminal defendant does not have a right to standby counsel and must accept the consequences of representing himself. *Id*., 422; *People v Hicks*, 259 Mich App 518,

[1] Pennell was at the time charged as a codefendant with defendant.

527; 675 NW2d 599 (2003). Conversely, a defendant who is represented by counsel does not have the right to direct his trial in any way he sees fit. *People v LaMarr*, 1 Mich App 389, 393; 136 NW2d 708 (1965). Moreover, a criminal defendant who has successfully asserted his right to self-representation and who has nevertheless been offered the assistance of counsel is not entitled to a law library. *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1996).

The trial court adequately explained to defendant that he was required to make a choice between *either* having an attorney *or* being an attorney, that defendant would be obligated to follow all proper procedures applicable to lawyers, and that it would be easy for defendant to damage his position by representing himself. Attached to defendant's initial letter to the trial court were messages he had transmitted to his first attorney stating, "'the rest of my life' is at stake here." Defendant was clearly aware of the risks and knew what he was doing. See *Hicks*, *supra* at 531. The trial court did not explicitly recite all the possible sentences to defendant, as required by MCR 6.005, but the rule was substantially complied with. Defendant's initial waiver of his right to counsel and assertion of his right to be his own counsel was valid.

However, the trial court clearly failed to comply with MCR 6.005(E)(1). The requirements of MCR 6.005(E) are fairly minimal and can be met so long as it is apparent from the record that the trial court readvised the defendant of the availability of a lawyer and that the defendant indicated his continuing desire to forgo one. *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996). The transcripts of the trial show that the trial court did not do so. However, unlike the initial waiver of counsel, *subsequent* waivers do not carry the same constitutional, structural, due process implications. *Id.*, 138-139. After a defendant properly *initially* waives the right to counsel, failure to comply with the subsequent requirements of MCR 6.005(E) is therefore reviewed for actual, rather than presumed, prejudice. *Id.*, 140. We find that defendant suffered no actual prejudice from the trial court's error.

Defendant asserts that he was prejudiced because the prosecutor and the trial court were essentially pursuing a vendetta against him, compounded by the fact that the case against him was complex and difficult to understand. There is nothing in the record to suggest that the prosecutor or the trial court tried to punish defendant for asserting any rights, and there is nothing to indicate that the charges brought by the prosecutor exceeded his discretion. *People v Jones*, 252 Mich App 1, 7-8; 650 NW2d 717 (2002). The trial court's adverse rulings, even if they were erroneous, would not be enough to show actual bias. *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995). Defendant knew from the outset that the information was complex, and again the record indicates that he understood the charges he was facing. Defendant also argues that he was not actually prepared to go to trial because he had not been given a sufficient opportunity to compare certain tape recordings to their transcripts and because he was unfamiliar with the Rules of Evidence and had been denied access to a copy of them until the day of trial. However, *presuming* the trial court had asked defendant whether he wished to be represented by counsel, and *presuming* defendant accepted the invitation, his attorney would have been no more familiar with the tapes and transcripts than defendant – probably much less so – and, as discussed *infra*, the only evidentiary error in this case was made by the trial court, not defendant. We find no prejudice.

Defendant was represented by counsel at his preliminary examination. He asserts that he received ineffective assistance of counsel there because his attorney failed to make a better argument against the adjournment and because his attorney failed to ask better questions of

witnesses. We have not been made aware of what, exactly, his attorney should have done instead of what she did. We find the adjournment was proper, and further objection by his trial counsel to the adjournment would have been futile, so failing to do so cannot be a basis for finding counsel ineffective. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant suggests that his attorney should have inquired into the witnesses being induced to identify him, but again, the witnesses did not identify defendant, so we do not believe this line of questioning would have affected the outcome of the case. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next argues that there was insufficient evidence to support his kidnapping and armed robbery convictions, and they are against the great weight of the evidence. We disagree. This Court reviews a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the prosecution to determine whether a reasonable finder of fact could find the elements of the crime proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). "We review de novo a claim of insufficient evidence; and a lower court's ruling on a motion for new trial based on the claim that the verdict was against the great weight of the evidence is reviewed for abuse of discretion." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). The "trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

One of the essential elements of forcible-confinement kidnapping is asportation of a victim, and that asportation may not be incidental to another underlying crime other than murder, extortion, or taking a hostage. *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984). Defendant argues that the victims were moved into the kitchen *pursuant to* the robbery. However, the evidence clearly shows that the robbery – of the keys to the victims' car – was an afterthought. It did not occur until the perpetrators discovered that their initial goal – drugs and money – could not be fulfilled, and the police presence outside required an escape plan other than their initial plan. The victims were otherwise moved to the kitchen for the purpose of restraint, control, and reducing their collective safety, when they otherwise could have been bound and left anywhere in the house. The kidnapping was independent of the armed robbery.

Defendant also asserts that the perpetrators told the victims that they would find their vehicle abandoned in Ohio or Indiana, thus showing no intent to *permanently* deprive the victims of property. This merely shows that the perpetrators did not intend to *retain* the vehicle, not that they intended to *return* it or take any affirmative steps to ensure that it would be returned. Given that their goal was to evade capture, the jury would have been entitled to regard the perpetrators' promise to abandon the vehicle as being, under the circumstances, not credible. We "must not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Drohan*, 264 Mich App 77, 88; 689 NW2d 750 (2004), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006). We find defendant's armed robbery and kidnapping convictions adequately supported by the evidence.

Defendant also argues that felonious assault is a lesser included offense of armed robbery, so convictions of both on the basis of the same acts violates the prohibition against double jeopardy. Defendant argues that larceny in a building and armed robbery are cognate offenses to which the same prohibition applies. We agree that felonious assault is an included

offense within armed robbery, and conviction of both violates the right to be free from double jeopardy unless the two crimes occurred at separate times. *People v Yarbrough*, 107 Mich App 332, 335-336; 309 NW2d 602 (1981). But again, the armed robbery did not take place until the perpetrators became aware of the police outside, *after* the felonious assault had ended and *after* the victims were bound in the kitchen, so there was no double jeopardy violation.

Larceny in a building and armed robbery are not included within each other, because they have independent elements not found in the other, but they are cognate offenses. *People v Stein*, 90 Mich App 159, 167; 282 NW2d 269 (1979); *People v Ramsey*, 218 Mich App 191, 195 n 6; 553 NW2d 360 (1996). Conviction of two cognate offenses arising out of the same conduct does not necessarily violate double jeopardy "where the Legislature intended to impose cumulative punishment for similar crimes, even if both charges are based on the same conduct." *People v Werner*, 254 Mich App 528, 535; 659 NW2d 688 (2002). Both crimes are derivations of larceny: they are theft offenses committed under certain circumstances. However, the gravamen of larceny in a building is the *location of* the theft offense, and the gravamen of armed robbery is the *manner in which* the theft offense is executed. Statutes that prohibit different kinds of harm or violations of different social norms are construed as impositions by the Legislature of multiple punishments. *People v Cortez*, 206 Mich App 204, 205; 520 NW2d 693 (1994). We see no evidence to the contrary here, so a defendant may be convicted of both larceny in a building and armed robbery on the basis of the same conduct.

Defendant next contends that the trial court erred in admitting into evidence a telephone call he placed from jail to Maricel Silva. Defendant contends that he had a right to privacy in the telephone call and that the trial court erroneously permitted the jury to receive a transcript of the call that omitted certain key statements tending to support his theory of the defense. Preliminary questions of law pertaining to admissibility of evidence are reviewed de novo, but otherwise the decision whether to admit evidence is reviewed only for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, if erroneously admitted evidence did not prejudice defendant, it will be considered harmless. *People v Rodriquez*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

The telephone system clearly informed the caller and the listener that the call was subject to monitoring and recording; defendant had no reasonable expectation of privacy. See *People v Bell*, 131 Mich App 586, 587-588; 345 NW2d 652 (1983); *People v DeGeer*, 140 Mich App 46, 47-48; 363 NW2d 37 (1985). Our review of the recording and comparison to the transcript reveals that the transcript *does* omit the statements defendant asserts were omitted. However, it contains other omissions, the absence of which likely *helped* defendant's case. For example, corrections of Silva's statements make it much clearer that she dropped both Pennell and defendant off at the house, contrary to defendant's testimony that he happened to be walking in the area when he was tackled by police officers who had apparently been chasing someone else. His statement that "nothing was exactly like it said it was" might refer to the situation being "like a complete set-up" by the police, but it might also refer to the apparent gross inaccuracy of Silva's brother's description of how the robbery could be performed and what would be gained thereby. Technically, the trial court should have verified the transcript's contents against the tape before admitting it. *People v Lester*, 172 Mich App 769, 774-776; 432 NW2d 433 (1988). However, the trial court's failure to do so here was harmless.

Defendant next asserts that he was denied his due process rights by being required to wear a leg restraint. We disagree. The leg restraint was not visible to the jury, it was worn underneath defendant's trouser leg, and although it caused him to limp, the trial court found that the limp was not noticeable. Moreover, the trial court made arrangements to ensure that defendant would not need to be seen walking in front of the jury. Even if the trial court's decision to shackle a defendant is without justification, the trial court's determination that the jury cannot perceive the shackles makes any error harmless. *People v Johnson*, 160 Mich App 490, 492-493; 408 NW2d 485 (1987). Nothing in the record suggests that the trial court erroneously concluded that the jury could not perceive defendant's restraint.

Defendant next argues that he was denied his right to cross-examination because the trial court refused to permit him to use a tape recording of Pennell's custodial interview with Detective Kevin Grayer, the lead officer on this case, to impeach the testimony of either. We review de novo issues concerning due process and confrontation clause violations. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001); *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000). The scope of cross-examination is discretionary with the trial court, but "that discretion must be exercised with due regard for a defendant's constitutional rights." *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). We believe the trial court erred in its basis for refusing to permit defendant to impeach Pennell. However, we are unconvinced that the ultimate result was incorrect, and we conclude that any error was not outcome determinative, so we will not reverse on that basis. *People v Watson*, 245 Mich App 572, 582; 629 NW2d 411 (2001).

Pennell allegedly gave Grayer statements at the interview that were inconsistent with Pennell's testimony at trial, and Grayer allegedly coached Pennell's testimony. During defendant's cross-examination of Pennell during the prosecution's case-in-chief, the trial court refused to permit defendant to impeach Pennell's testimony with the tape recording of the interview, either because it would constitute hearsay or because it was "not defendant's case at that point." However, out-of-court statements introduced for the purpose of impeachment are not hearsay. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). And "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." MRE 607. The trial court clearly erred in refusing to permit defendant to impeach Pennell's testimony. However, the record shows that defendant had a document of an unspecified nature with which he challenged Pennell's testimony using prior inconsistent statements Pennell made to Grayer. For example, defendant obtained the concession from Pennell that he had told Grayer he purchased duct tape, contrary to Pennell's trial testimony that he did not purchase duct tape. Later in the trial, defendant noted that a transcript of the interview had been attached to the police report, notwithstanding the prosecutor's statement earlier that no such transcript existed. Therefore, despite the trial court's clear legal error, we do not believe defendant was denied a meaningful opportunity to challenge Pennell's credibility with prior inconsistent statements he made to Grayer.

Defendant again sought to admit the tape during his direct examination of Grayer. The trial court listened to the tape and concluded that there was no basis for impeaching Grayer's testimony and that it did not show any coaching. The prosecution asserted that the tape was hearsay. It was appropriate to refuse to admit the tape for the purpose of impeaching Grayer, because defendant made it clear that he sought to cast doubt on *Pennell's* testimony, not

Grayer's. Because defendant wished to introduce the tape only to show that Grayer coached Pennell, it would not have been hearsay. See *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995), cert den sub nom *Fisher v Burke*, 522 US 872; 118 S Ct 187; 139 L Ed 2d 127 (1997) (holding that a statement introduced to show its effect on the listener or reader rather than the truth or falsity of the statement itself is not hearsay). However, nothing provided to us suggests that the trial court erred in finding no evidence of coaching on the tape. Furthermore, the only alleged coaching pertained to matters like whether there was anything in a safe and who purchased the duct tape, rather than the critical aspect of Pennell's testimony, which was identifying defendant as one of the perpetrators. The trial court's legal reasoning for excluding the tape during Pennell's testimony was erroneous. However, it appears that the trial court would not have abused its discretion by excluding the tape as irrelevant, and we see no evidence that defendant was prejudiced by the trial court's decision.

Defendant next argues that the prosecutor engaged in misconduct by making an appeal to sympathy for the victims and by personally denigrating defendant as defense counsel. We disagree. Any alleged impropriety is viewed on a case-by-case basis in the context of all other facts and evidence in the case. *People v Bahoda*, 448 Mich 261, 267 n 7; 531 NW2d 659 (1995). In context, the prosecutor was suggesting, albeit colorfully, that defendant's *testimony* was extremely improbable and unworthy of belief, not that defendant in his role as his own attorney was attempting to mislead the jury. The prosecutor also suggested to the jury that the situation for the victims had been horrible and that he could not imagine it happening to himself. It is improper argument for a prosecutor to urge the jury to sympathize with the victim. *Watson*, supra at 591. However, presuming this remark was an appeal for sympathy, it was also isolated, and it was far less immoderate than "repeatedly referring to '"the poor innocent baby."'" *Id*., quoting *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). Indeed, it is less blatant even than asserting that a victim was treated "in a way that no animal should be treated." *Id*. Even if the prosecutor's remark here went beyond the bounds of propriety, it was not enough to prejudice defendant or deny him a fair trial.

Because we find no errors that actually harmed defendant, we need not consider his argument that the combined effect thereof warrants reversal. "The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *Ackerman*, *supra* at 454. However, each of those errors must have had *some* detrimental effect on defendant for them to be able to cause any prejudice in the aggregate. *Id*.

Defendant finally argues that the trial court erroneously scored his sentencing guidelines, and offense variables 7, 10, and 14 should have been scored at zero points. We disagree.[2] The trial court's discretionary decisions regarding the number of points to score a defendant's sentencing guidelines will be upheld if there is any evidence to support them, but preliminary legal questions are reviewed de novo. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

[2] We do not address OV 10 because after resentencing, the trial court already scored OV 10 at zero points for all of defendant's convictions on the updated sentencing information reports.

Under OV 14, ten points should be scored if "[t]he offender was a leader in a multiple offender situation," taking into account "[t]he entire criminal transaction" and the possibility of multiple "leaders" if "3 or more offenders were involved." MCL 777.44. Pennell and defendant could both have been considered "leaders," given that Silva clearly played a more subordinate and facilitative role in the matter. Pennell's testimony also supports a finding that defendant was the primary motivating force behind the initial robbery plan. Under OV 7, fifty points should be scored if any "victim," defined as a "person who was placed in danger of injury or loss of life," was "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37. Defendant argues only that these things all occurred *as elements of* the offenses, so they may not be used to score offense variables. However, "the Sentencing Guidelines allow a factor that is an element of the crime charged to also be considered when computing an offense variable score," and doing so also does not constitute a Double Jeopardy violation. *People v Gibson*, 219 Mich App 530, 534-535; 557 NW2d 141 (1996). Therefore, no scoring error occurred.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio